

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

**BARBARA SCHWAB et al., individually and
on behalf of all others similarly situated,**

Plaintiffs,

v.

PHILIP MORRIS USA, INC., et al.,

Defendants.

Civil Action No. CV 04-1945

DECLARATION OF BRUCE NEIDLE

I, Bruce Neidle, being duly sworn, state as follows:

1. I am the Director of Business Analysis at Philip Morris USA Inc. ("PM USA"). I have held this position since 2003. Prior to that, I was the Senior Manager of Forecasting, a position that I held for approximately two years. Before that, I was a Senior Manager of Competitive Analysis and a Manager of Forecasting. I hold a Bachelors Degree in Marketing from the Rochester Institute of Technology and a Masters of Business Administration from Hofstra University.

2. At PM USA, I integrate marketplace information and analysis to develop business insights. As part of my job responsibilities, I am familiar with the factors that influence the retail selling price of PM USA's cigarettes. My job responsibilities also require me to track the retail selling price and market share of cigarettes manufactured by PM USA and other cigarette manufacturers. I have attached to this declaration the price and market share data to which I refer herein.

3. The retail selling price of PM USA's cigarettes depends principally on a combination of four main factors: (1) the list price established by PM USA; (2) any wholesale or retail discounts or promotions offered by PM USA; (3) state and local requirements such as excise taxes; and (4) wholesaler and retailer competition, discounts, and mark-ups. To the best of my knowledge, none of these factors has ever been affected by the tar or nicotine yield of a particular cigarette.

4. The first factor that influences the price of a brand of PM USA's cigarettes is the list price that PM USA establishes for that particular brand family. The list price is the price at which PM USA sells its cigarettes to direct buying customers (distributors or wholesalers). "Brand family" refers to brands such as Marlboro, Virginia Slims, Parliament, etc., and includes all of the various styles – full flavor, lights, ultralights – sold under the same brand name. (Marlboro, Marlboro Lights, and Marlboro Ultralights, for example, are all members of the same brand family.) PM USA generally has set the same list price for all twenty pack cigarettes within a particular brand family. I am not aware of any price difference within a brand family that has been related to or motivated by tar and nicotine yields.

5. An example of an instance in which PM USA priced cigarettes differently within a brand family is its former practice of pricing of King size filter cigarettes differently from 100s cigarettes. Prior to 1993, PM USA listed 100s at a higher price than King size filter cigarettes. The rationale for this higher list price was that 100s are longer than King size cigarettes. To the best of my knowledge, this differential price was neither motivated by, nor based on, the tar or nicotine yield of either type of cigarette.

6. PM USA ended its differential pricing of King size and 100s in 1993. The decision was influenced by the understanding that the price difference was not consistently being passed on to consumers at the retail level. Many retailers instead decided to charge a uniform price for all PM USA brand cigarettes even though PM USA charged different list prices for Kings and 100s. It is my expectation that many in the trade, including direct buying wholesaler and retailer customers, would continue to charge the same price for all cigarettes within a brand family even if PM USA listed the cigarettes at different prices. If this were to occur, as it has in the past, the trade would capture a profit that otherwise would go to PM USA.

7. The second main factor of the retail selling price of PM USA's cigarettes is any discount or promotion that PM USA offers. Like the list price, PM USA's discounts and price promotions are uniform within a brand family, with one recent exception.

8. The exception is a deeper discount that PM USA has recently offered on a new line of Marlboro products, Marlboro brand 72 mm cigarettes (Marlboro Red 72 mm, Marlboro Lights 72 mm, and Marlboro full flavor menthol 72 mm). These discounts are in no way motivated by, or based on, the tar yield of these cigarettes. PM USA offers the same discount for its Marlboro Red 72 mm as it does for its Marlboro Lights 72 mm. PM USA does not offer a 72 mm Marlboro Lights menthol cigarette.

9. The third factor upon which the retail selling price of PM USA's cigarettes depends is state and local requirements, including state and local excise tax rates. Excise tax rates typically are defined by a statutory rate per cigarette. The rate does not vary based upon tar yield or any other cigarette characteristic.

10. The fourth major factor upon which the retail selling price of PM USA's cigarettes depends is wholesaler and/or retailer competition, discounts, and mark-ups. My responsibilities at PM USA require me to be aware of retailers' pricing practices nationwide. Based on my review of retail scanning data, retailers always have charged the same price for the light and non-light members of a particular brand family.

11. As part of my responsibilities at PM USA, I have observed non-confidential information relating to the historic and current pricing of other cigarette manufacturers. I know of no manufacturer that has charged differential list prices based on the tar yields of members of the same cigarette brand family. This includes manufacturers of discount brand cigarettes, the segment of the cigarette market in which consumers are most price-sensitive to attributes of different product lines. I know of no discount cigarette brand in which there is a price difference based on tar yield.

12. My job responsibilities require me to track the retail selling price of PM USA's cigarettes over time. In September 2000, the average retail selling price of PM USA's premium light cigarettes nationally in convenience stores was \$3.30 per pack. In December 2004, the average retail selling price of PM USA's premium light cigarettes nationally in convenience stores was \$4.05 per pack. The average retail selling price of PM USA's premium light cigarettes, therefore, increased from 2000 to 2004.¹

¹ The price estimates described herein were based on a three-month moving average. The September 2000 estimate was based on data from July, August, and September 2000. The December 2004 estimate was based on data from October, November, and December 2004. This data was developed to measure performance in retail stores selling cigarettes and were not designed to capture internet or direct mail sales.

13. My job responsibilities also require me to track the retail market share of PM USA's and other manufacturers' cigarettes over time. Retail market share data provides a measure of consumers' demand for light and other cigarettes. In contrast to overall sales volume data, market share data takes into account the fact that the cigarette market is a declining market due to the decrease in smoking that has occurred and continues to occur.

14. My understanding is that the National Cancer Institute's Monograph No. 13 was released in November 2001. In November 2002, November 2003, and November 2004, PM USA appended to packages of light cigarettes sold nationwide an insert containing information about light cigarettes. As Exhibit 1 demonstrates, the aggregate nationwide retail market share of PM USA's light cigarettes did not decline in response to these informational events. Instead, the national retail market share of PM USA's light cigarettes increased during this time.

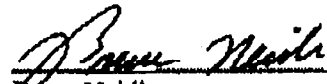
15. The market share of the 65 light cigarette brands listed in Appendix A of the plaintiffs' Second Amended Complaint also did not decline in response to these informational events. Instead, as Exhibit 2 demonstrates, the aggregate market share of these 65 light cigarette brands increased during this time period.

16. The market share of all light cigarettes shows a similar trend. As Exhibit 3 demonstrates, the aggregate nationwide market share of all light cigarettes did not decline in response to the publication of Monograph No. 13 or PM USA's inserts. The market share in fact increased from September 2000 to the present.

17. I also have studied the market share of all light cigarettes in Illinois both before and after the judgment in *Price v. Philip Morris, Inc.*, No. 00-L-112, 2003 WL

22597608 (Ill. Cir Ct. Mar. 21, 2003). As Exhibit 4 demonstrates, the market share of light cigarettes in Illinois did not decline in response to the *Price* judgment.

I, Bruce Neidle, declare under penalty of perjury that the foregoing is true and correct.


Bruce Neidle

Dated this 30 day of June, 2005.